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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Barry Lee Jones,

Petitioner,

V.

Charles L. Ryan, et al,

Respondents.

No. CV-01-00592-TUC-TMB

DEATH PENALTY CASE

ORDER

In accordance with the Court's Order, (Doc. 186) the parties, through undersigned counsel, jointly propose that the Court issue an order of protection to protect Petitioner's limited waiver of the attorney-client privilege, work product, and Fifth Amendment privilege, as set forth in the proposed order below.

Order of Protection

The Court has determined that an evidentiary hearing is necessary with respect to whether state PCR counsel was ineffective for failing to raise Claim 1D in Petitioner's first PCR proceeding. (Doc. 185). Claim 1D alleges ineffective assistance of trial counsel during the guilt and sentencing phases of Jones' capital proceedings. At the evidentiary hearing, this Court will determine whether Petitioner's state court PCR counsel acted deficiently in defaulting the subject claims against trial counsel, and whether there is a reasonable probability the result of the PCR proceedings would have been different. Assessing the latter will necessarily entail considering the merits of the defaulted IAC claim against trial counsel. *Clabourne v. Ryan*, 745 F.3d 362, 377-78 (9th Cir. 2014).

1 The parties agree that Petitioner's prosecution of his claims of ineffective assistance of
2 PCR and trial counsel, and the Respondents' defense thereof (1) will necessarily result in
3 a limited waiver of the attorney-client privilege and work product protections; and (2)
4 *may* result in a waiver of Petitioner's Fifth Amendment privilege. The parties further
5 agree that an order of protection is necessary to protect the Petitioner's limited waiver of
6 these privileges and constitutional rights in these proceedings. The Court enters such an
7 order for the reasons and in accordance with the scope described below.

8 Attorney-Client Privilege and Work Product. "It has long been the rule in the
9 federal courts that, where a federal habeas petitioner raises a claim of ineffective
10 assistance of counsel, he waives the attorney-client privilege as to all communications
11 with his allegedly ineffective lawyer." *Bittaker v. Woodford*, 331 F.3d 715, 716 (9th Cir.
12 2003) (en banc). While assertion of an ineffective assistance of counsel claim does
13 constitute a waiver of the attorney-client privilege and work product protections, that
14 waiver is limited and this Court is required "to ensure that the party given . . . access to
15 [attorney-client or work product materials] does not disclose these materials, except to
16 the extent necessary in the habeas proceeding." *Id.* at 727-78. Under *Bittaker*, when this
17 Court permits discovery or disclosure of otherwise confidential or privileged information
18 for use in federal habeas proceedings, the use of such privileged or confidential
19 information must be limited to those proceedings, and not used in any retrial or
20 resentencing proceeding, should one or the other occur. *Id.* at 726.

22 Fifth Amendment Privilege. In respect to the prosecution of an ineffective
23 assistance of counsel claim in federal habeas proceedings, the Fifth Amendment
24 constitutional guaranty against self-incrimination prohibits use of Petitioner's testimony
25 elicited in such federal proceedings at any later proceeding. *See Lambright v. Ryan*, 698
26 F.3d 808, 822 (9th Cir. 2012) (petitioner's testimony in federal habeas proceeding is
27 prohibited from being used at resentencing "so long as it could be used to establish
28 aggravating factors or to undermine his claim of mitigating factors"). The Fifth

1 Amendment also protects Petitioner's statements to mental health or medical experts and
2 places limitations on the use of such statements at a later proceeding. *Id.* at 823; *Estelle v.*
3 *Smith*, 451 U.S. 454 (1981) and see, *Lambright v. Ryan*, No. CV-87-235-TUC-CJK at
4 Dist. Ct. Doc. No. 413 p. 3-4.

5 Based on the foregoing, **IT IS HEREBY ORDERED** that all attorney-client
6 privileged communication and work product related information disclosed in these
7 proceedings during disclosure, discovery, or at the hearing, and designated confidential in
8 accordance with the court-approved procedure described below, shall only be used in
9 these proceedings. Documents and other evidence designated as confidential attorney-
10 client or work product, in accordance with the court-approved procedure described
11 below, may not be disclosed or used in any other proceeding, including Petitioner's
12 retrial or resentencing, should relief be granted in these proceedings and a retrial or a
13 resentencing ensues.

14 **IT IS FURTHER ORDERED** that any testimony which Petitioner may give in
15 these proceedings, any statements Petitioner has or will provide to mental health or
16 medical experts, and the expert findings reliant or based on those statements, shall only
17 be used in these proceedings, once such evidence is designated as "Confidential" as
18 determined in accordance with the court-approved procedure described below.
19 Documents and other evidence designated as confidential under the Fifth Amendment, in
20 accordance with the court-approved procedure described below, may not be disclosed or
21 used in any other proceeding, including Petitioner's retrial or resentencing, should relief
22 be granted in these proceedings and a retrial or resentencing ensues.

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24 **IT IS FURTHER ORDERED** that the ultimate determination of the
25 confidentiality of documents and evidence shall be determined and regulated under the
26 following procedure:

27 1. **Petitioner's Document Disclosures:** Any documents produced or disclosed
28 by the Petitioner, which the Petitioner deems protected by the limited waiver of the

1 attorney-client privilege, work product, or the Fifth Amendment privilege, shall be
2 stamped “Confidential”. Exclusive of any expert witness reports produced by the
3 Petitioner, which are separately addressed for confidentiality and protection in paragraph
4 below, within 20 days after service of the confidential documents on the Respondents,
5 the Respondents shall either accept the confidential designation, or interpose an objection
6 to the designation by notifying Petitioner in writing of the reason for the objection.
7 Petitioner shall reply to the Respondents’ objection within 15 days of receiving
8 Respondents’ objection, and if the parties are still in disagreement, then either party may
9 present a timely application for resolution of the confidentiality dispute to the Court. Any
10 documents marked “Confidential” to which Respondents have made no timely objection,
11 or any documents to which objection has been made, which have been designated
12 confidential by the Court, shall be deemed confidential for all purposes in all phases of
13 these proceedings, including any appeal after this Court’s judgment, and such documents
14 may not be disclosed or used in any other proceeding, including Petitioner’s retrial or
15 resentencing if such proceedings ensue, except that any party may move to vacate or
16 modify the protective order should they believe grounds exist to do so.
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18 2. Respondents’ Document Disclosures: Any documents produced or
19 disclosed by the Respondents, which the Petitioner deems protected by the limited waiver
20 of the attorney-client privilege, work product, or the Fifth Amendment privilege, shall be
21 stamped “Confidential” within 15 days of Petitioner’s receipt of the documents.
22 Exclusive of any expert witness reports produced by the Respondents, which are
23 separately addressed for confidentiality and protection in paragraph 6 below, within 20
24 days after Petitioner notifies Respondents of any documents he deems confidential, the
25 Respondents shall either accept the confidential designation, or interpose an objection to
26 the designation by notifying Petitioner in writing of the reason for the objection.
27 Petitioner shall reply to the Respondents’ objection within 15 days of receiving
28 Respondents’ objection, and if the parties are still in disagreement, then either party may

1 present a timely application for resolution of the confidentiality dispute to the Court. Any
2 documents marked “Confidential” to which Respondents have made no timely objection,
3 or any documents to which objection has been made, which have been designated
4 confidential by the Court, shall be deemed confidential for all purposes in all phases of
5 these proceedings, including any appeal after this Court’s judgment, and such documents
6 may not be disclosed or used in any other proceeding, including Petitioner’s retrial or
7 resentencing if such proceedings ensue, except that any party may move to vacate or
8 modify the protective order should they believe grounds exist to do so.

9 3. Depositions: Within 30 days after the transcription of the transcript of any
10 deposition, any portion of the deposition which the Petitioner deems protected by the
11 limited waiver of the attorney-client privilege, work product or the Fifth Amendment
12 privilege, shall be identified by designation of page and line number as confidential.
13 Exclusive of expert witness deposition testimony, which is separately addressed for
14 confidentiality and protection in paragraph 6 below, the parties shall interpose their
15 objections and replies to such designations, and seek Court resolution of any
16 disagreement as outlined in paragraph 1 above. Any deposition testimony identified as
17 confidential, to which Respondents have made no timely objection; or any such
18 testimony to which objection has been made, which have been designated confidential by
19 the Court, shall be deemed confidential for all purposes in all phases of these
20 proceedings, including any appeal after this Court’s judgment, and may not be disclosed
21 or used in any other proceeding, including Petitioner’s retrial or resentencing if such
22 proceedings ensue, except that any party may move to vacate or modify the protective
23 order should they believe grounds exist to do so.

24 4. Hearing Related Documents and Testimony: Exclusive of expert witness
25 reports or expert deposition testimony, which are separately addressed for confidentiality
26 and protection in paragraph 6 below, prior to the commencement of the hearing, the
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1 Court shall resolve any remaining disputes with respect to the confidentiality of non-
2 expert related documents or deposition testimony.

3 5. Exclusive of any expert witness testimony which is separately addressed for
4 confidentiality and protection in paragraph 6 below, within 90 days after the transcription
5 of the transcripts of the concluded evidentiary hearing, any portion of the hearing
6 transcript which the Petitioner deems protected by the limited waiver of the attorney-
7 client privilege, work product or the Fifth Amendment privilege, shall be identified by
8 designation of page and line number as confidential. The parties shall interpose their
9 objections and replies to such designations, and seek Court resolution of any
10 disagreement as outlined in paragraph 1 above. Any hearing testimony identified as
11 confidential to which Respondents have made no timely objection; or any testimony to
12 which objection has been made, which has been designated confidential by the Court,
13 shall be deemed confidential for all purposes in all phases of these proceedings, including
14 any appeal after this Court's judgment, and may not be disclosed or used in any other
15 proceeding, including Petitioner's retrial or resentencing if such proceedings ensue,
16 except that any party may move to vacate or modify the protective order should they
17 believe grounds exist to do so.
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19 6. Petitioner's statements to experts, expert witness reports disclosed by the
20 parties, and testimony given by experts in deposition or at the hearing, shall remain
21 confidential throughout these proceedings, and thereafter to the extent provided for by the
22 Court. Within 90 days after the transcription of the transcripts of the concluded
23 evidentiary hearing, any portion of the hearing transcript, deposition transcripts or expert
24 reports which the Petitioner deems protected by the limited waiver of the attorney-client,
25 work product or Fifth Amendment privilege, shall be identified by designation of page,
26 and line number where appropriate, as confidential. The parties shall interpose their
27 objections and replies to such designations, and seek Court resolution of any
28 disagreement as outlined in paragraph 1 above. Any portion of expert reports or expert

1 testimony identified as confidential to which Respondents have made no timely
2 objection; or any portion of expert reports or expert testimony to which objection has
3 been made, which has been designated confidential by the Court, as well as any
4 statements made by the Petitioner, shall be deemed confidential for all purposes in all
5 phases of these proceedings, including any appeal after this Court's judgment, and may
6 not be disclosed or used in any other proceeding, including Petitioner's retrial or
7 resentencing if such proceedings ensue, except that any party may move to vacate or
8 modify the protective order should they believe grounds exist to do so.

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10 **IT IS SO ORDERED.**

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Dated this 3rd day of February, 2017.

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/s/ Timothy M. Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE

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